

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DEONANDRE TOLLIVER,	§	
	§	No. 231, 2005
Defendant Below,	§	
Appellant,	§	
	§	
v.	§	Court Below: Superior Court
	§	of the State of Delaware
STATE OF DELAWARE,	§	in and for Kent County
	§	
Plaintiff Below,	§	Cr. I.D. No. 0405003864
Appellee.	§	

Submitted: January 11, 2006

Decided: February 23, 2006

Before **STEELE**, Chief Justice, **BERGER** and **RIDGELY**, Justices.

ORDER

This 23<sup>rd</sup> day of February, 2006, upon consideration of the briefs and arguments of the parties, it appears to the Court that:

1) Deonandre Tolliver appeals from his convictions, following a jury trial, of delivery of cocaine and related drug charges. He argues that the Superior Court: i) erred in denying his motion for a mistrial after the jury heard evidence of an uncharged crime; and ii) abused its discretion in refusing to disclose the identity of a confidential informant. We find no merit to either argument.

2) On February 20, 2004, Milford Police Officer John Horsman made an undercover purchase of crack cocaine from Tolliver. Horsman arranged for the

purchase through a confidential informant, who told Horsman to meet Tolliver at a house on Mill Street, in Milford, Delaware. Horsman testified that he met Tolliver and a girlfriend on the front porch. The girlfriend removed a plastic bag containing cocaine from her blouse and handed the bag to Tolliver. The two men discussed how much Horsman wanted to buy, and after weighing it on his digital scale, Tolliver gave Horsman approximately 1.8 grams of cocaine in exchange for \$80.

3) Before trial, Tolliver filed a motion to disclose the identity of the confidential informant. Tolliver's defense was that his companion was the one who sold the cocaine to Horsman. If the confidential informant was present during the transaction, that person might confirm Tolliver's version of events. The trial court conducted an *in camera* hearing and denied Tolliver's motion on the ground that the confidential informant would not be able to materially aid the defense.

4) At trial, Horsman described what happened from the time he met Tolliver until he joined other police officers immediately after the drug transaction. During the course of that testimony, the prosecutor asked whether Horsman was the only person who bought cocaine at that time. Horsman answered that an unknown "white female" bought a gram of cocaine from Tolliver just before he did. Tolliver objected and asked for a mistrial. The trial court denied the motion, but immediately instructed the jury not to consider testimony about an alleged sale to another person.

5) The prosecutorial misconduct that Tolliver complains about in his first argument is troubling. Tolliver was not charged with the second drug transaction, but the prosecutor asked about it in order to bolster the evidence that it was Tolliver, not his female companion, who was selling the drugs:

Q. And were you the only person to buy cocaine?

A. There was a white female there that also bought cocaine. She bought a gram for \$50 just prior to me buying mine.

Q. Did you know that person?

A. No, had no idea.

Q. And did she also deal with the defendant?

A. Yes.

Q. Did the girlfriend have anything to do with that?

A. No.

The question about another drug sale clearly was intentional and improper. Tolliver objected, however, and the trial court promptly instructed the jury not to consider that testimony.

6) We review the trial court's decision to deny Tolliver's motion for a mistrial for abuse of discretion.<sup>1</sup> A mistrial should be granted only if there is a "manifest

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<sup>1</sup>*Flowers v. State*, 858 A.2d 328, 332 (Del. 2004).

necessity ... or the ends of public justice would otherwise be defeated.”<sup>2</sup> A curative instruction generally is sufficient to eliminate the prejudice from inadmissible evidence, since the jury is presumed to follow the court’s instruction to disregard the evidence.<sup>3</sup> We are satisfied that the trial court acted within its discretion in giving a curative instruction instead of granting Tolliver’s motion for a mistrial.

7) Tolliver wanted to learn the identity of the confidential informant because he hoped the confidential informant would support his claim that the girlfriend was the person who sold drugs to Horsman. Tolliver theorized that the confidential informant might be the girlfriend or the other woman who bought cocaine just before Horsman. Tolliver asked this Court to unseal the record of the *Flowers*<sup>4</sup> hearing, but his motion was denied. Alternatively, Tolliver asks this Court to review the transcript of that hearing to determine whether the trial court erred in refusing to disclose the confidential informant’s identity.

8) It is settled law that “the identity of a confidential informant is privileged unless there is a reasonable probability that the informant possesses information that would materially aid the defense. If... the informant may have such information,

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<sup>2</sup>*Fanning v. Superior Court*, 320 A.2d 343,345 (Del. 1974)(quoting *United States v. Perez*, 22 U.S. 579 (1824)).

<sup>3</sup>*Capano v. State*, 781 A.2d 556, 588-89 (Del. 2001).

<sup>4</sup>*State v. Flowers*, 316 A.2d 564 (Del. Super. 1973).

[D.R.E. 509] contemplates that the court will hold a so-called ‘*Flowers* hearing’ to decide, from affidavits and/or testimony, whether the informant’s identity should be revealed....”<sup>5</sup> This Court reviewed the transcript of the *Flowers* hearing, and is satisfied that the trial court correctly determined that the informant would not be able to materially aid the defense because the informant did not participate in or witness the drug transaction. As a result, the informant would not be able to state whether it was Tolliver or the girlfriend who sold the drugs to Horsman.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court be, and the same hereby is, AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger  
Justice

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<sup>5</sup>*Marin v. State*, 1999 WL 485201, at \*\*1 (Del.)